

2011

# Living Rivers v. Utah Department of Natural Resources, Board of Oil, Gas, and Mining : Brief of Appellee

Utah Court of Appeals

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## Recommended Citation

Brief of Appellee, *Living Rivers v. Utah Department of Natural Resources, Board of Oil, Gas, and Mining*, No. 20110242 (Utah Court of Appeals, 2011).

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IN THE UTAH COURT OF APPEALS

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LIVING RIVERS.

Petitioner Appellant.

vs.

UTAH DEPARTMENT OF NATURAL  
RESOURCES, BOARD OF OIL, GAS AND  
MINING and DIVISION OF OIL, GAS AND  
MINING,

Respondents Appellees,

and

WESTWATER FARMS, LLC,

Intervenor/Appellee.

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Appeal No. 20110242 CA

**Agency Decision Nos.:**

Docket No. 2010-029

Cause No. UIC-358.1

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**BRIEF OF APPELLEES THE BOARD OF OIL, GAS AND MINING and  
THE DIVISION OF OIL, GAS AND MINING**

---

PETITION FOR REVIEW OF DECISION AND ORDERS FROM  
THE BOARD OF OIL, GAS AND MINING

Agency Decision Nos.: Docket No. 2010-029, Cause No. UIC 358.1

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**IN THE UTAH COURT OF APPEALS**

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## **STATEMENT OF JURISDICTION**

This is a petition for review of a decision of the Utah Board of Oil, Gas and Mining (the “Board”) arising out of a formal administrative proceeding.<sup>1</sup> This case was transferred to the Utah Court of Appeals by the Utah Supreme Court pursuant to Utah Code Ann. §78A-3-102(4). This Court has jurisdiction over this appeal pursuant to Utah Code Ann. §78A-4-103(2)(j).

## **INTRODUCTION**

Living Rivers appeals the Board’s decision to grant a water injection well permit. It alleges generally that the Board failed to decide all issues requiring resolution and that its findings are not supported by substantial evidence. Petitioner’s Brief at 1-3. But Living Rivers fails to clearly specify which issues the Board did not decide or which of the Board’s findings it challenges.<sup>2</sup> When it does reference a specific factual finding, Living Rivers fails to marshal the evidence supporting that finding. These deficiencies in Living Rivers’ brief

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<sup>1</sup> Although the arguments set forth in the Petitioner’s Brief are directed at decisions made by the *Board* of Oil, Gas and Mining, the caption of the Petitioner’s Brief incorrectly states that this matter involves a petition for review of decisions of the *Division* of Oil, Gas and Mining (“Division”). While the Division was a party to the proceedings below and participates in this appeal, the decisions under review are those of the Board. The Board and Division jointly file the present brief and the caption set forth above reflects that both the Board and Division are Respondent/Appellees in this matter.

<sup>2</sup> Living Rivers identifies three distinct issues in its Statement of Issues, but abandons that organization in its argument section, and instead combines all of its arguments into a single section labeled “I.A.” This combined argument section does not clearly delineate which issues the Board allegedly failed to decide and is less than clear in identifying which factual findings are being challenged. It is difficult to determine which portions of the argument section are directed at Point I vs. Point II of Living Rivers’ Statement of Issues.

shift the burden onto the Board to identify for the Court each regulatory issue requiring resolution, the Board's findings on those issues, and the substantial evidence in the record supporting the Board's findings. The Board has set forth this information in its Statement of Facts below. Although detailed and technical, this summary allows the Board to better address in the Argument section the appropriateness of its decision and the substantial evidence in the record supporting its findings.

### **STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**

In this appeal, Petitioner/Appellant Living Rivers raises the following issues, governed by the following standards of review.

1. Whether the Board decided all issues requiring resolution in making the decision under review.

The Board's permit decision is governed by the applicable regulations discussed more fully below. Whether the Board decided all issues requiring resolution under those regulations is a question of law reviewed for correctness. *Orchard Park Care Ctr. v. Dep't of Health*, 2009 UT App 284, ¶ 8, 222 P.3d 64.

2. Whether substantial evidence from the entire record supports the findings made by the Board in granting the injection well permit.

To determine whether agency findings are supported by substantial evidence, the Court determines whether, in light of the evidence "a reasonable mind could reach the same conclusion as the Board. It is not [the court's] prerogative to weigh the evidence anew." *Patterson v. Utah City Bd. of Adjustment*, 893 P.2d 602, 604 (Utah App.1995).

3. Whether the Board properly exercised its discretion to deny Living Rivers' Request for Rehearing and Modification of Existing Order.

This Court reviews the Board's decision to deny Living Rivers' request for rehearing for abuse of discretion, and will disturb that decision only if it exceeds the bounds of reasonableness and rationality. *See Wasatch Oil & Gas, LLC v. Reott*, 2011 UT App 152, ¶8, 682 Utah Adv. Rpt. 50 (reviewing trial court decision on whether to reconsider its ruling for abuse of discretion); *Grace Drilling Co. v. Bd of Review of Indus. Comm'n*, 776 P.2d 63, 70 (Utah App.1989) (applying abuse of discretion review to agency decision not to reopen record to take additional evidence and reconsider its prior ruling).

### **DETERMINATIVE LAW**

Living Rivers challenges the Board's application of the provisions of the Utah Oil and Gas Conservation Act, Utah Code Ann. §40-6-1, et seq., and in particular Section 5 of the Act, Utah Code Ann. §40-6-5, which is attached hereto in its entirety as an addendum. The Board's decision was made pursuant to regulations regarding injection wells that the Board promulgated under the above-referenced statute. Those regulations are codified at Utah Admin. Code R649-5-1 and R649-5-2, and are attached hereto in their entirety.

Living Rivers also challenges the Board's decision to deny its Motion for Rehearing under Section 302(1)(a) of the Utah Administrative Procedures Act ("UAPA"),

Utah Code Ann. §63G-4-302(1)(a), as well as the Board's rehearing rule codified at Utah Admin. Code R641-110-200, both of which are attached hereto as addenda.

Finally, this appeal involves review of formal agency action and is governed by the terms of Section 403 of UAPA, Utah Code Ann. §63G-4-403, also attached in its entirety.<sup>3</sup>

### **STATEMENT OF THE CASE AND STATEMENT OF FACTS**

#### **I. Nature of the Case, Course of Proceedings and Disposition Below.**

1. Living Rivers appeals from the Board's decision to grant Intervenor, Westwater Farms, LLC's ("Westwater's") application for approval of a Class II water injection well (the "Subject Well") for purposes of water disposal. The Subject Well is to be part of a recycling facility for produced water (R.206 at 31-33). Produced water is a mix of hydrocarbons and saline ground water that is a by-product of oil and gas drilling. The subject facility will filter and treat produced water to generate water suitable for agricultural use. *Id.*

2. Unlike most disposal wells approved by the Board, Westwater anticipates that the Subject Well will not be used on a regular and sustained basis, as it is intended

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<sup>3</sup> Although Living Rivers invokes certain subsections of Utah Code Ann. §63G-4-403(4) (e.g. regarding whether the Board decided all issues requiring resolution and whether its findings are supported by substantial evidence, Petitioner's Brief at 1-3), it has failed to demonstrate it was "substantially prejudiced" by any of these alleged failures as required under that section, and this Court may affirm on that basis. *See Mountain Fuel Supply Co. v. Public Serv. Comm'n*, 861 P.2d 414, 423 (Utah 1993) (noting "aggrieved party must be able to demonstrate how the agency's action has prejudiced it").

only to provide backup storage and/or disposal capacity during periods in which the water recycling facility may shut down or go off line (R.206 at 31-32 and 42). Nevertheless, the Board proceeded as if the recycling plant did not exist and treated the application as one for a standard injection well that will be used on a continuous basis (R.206 at 38 and 43).

3. The Board granted Westwater's injection well application pursuant to the Board's underground injection control ("UIC") regulations, Utah Admin. Code R649-5-1 and R649-5-2. Pursuant to those regulations, an injection well application is first submitted to the Division of Oil, Gas and Mining (the "Division"). Utah Admin. Code R649-5-3.2 and 3.3. If no objections to the application are received, the Division may administratively process the application through an informal adjudication carried out by its technical staff. Utah Admin. Code R649-5-3.3. In the event of an objection, the application may only be granted after a formal evidentiary hearing before the Board.<sup>4</sup> Utah Admin. Code R649-5-3.4.

4. Though Petitioner Living Rivers objected to Westwater's application and requested a formal hearing, it did not present any evidence to support its objections or to contravene the evidence presented by the applicant Westwater. *See* Statement of Facts at ¶¶ 14-15 and 30-31.

#### The Informal Proceedings Before the Division

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<sup>4</sup> The Board is an administrative tribunal that conducts formal adjudications pursuant to Utah Code Ann. §63G-4-204 through 208, and is a separate entity from the Division.

5. On May 26, 2009, Westwater submitted an application with the Division for administrative approval of the Subject Well, a Class II injection well in Grand County, Utah (R.5-6 at ¶3). In August 2010, Westwater amended its application and, pursuant to Utah Admin. Code R649-5-3.2, the Division published notice of the application in the Salt Lake Tribune, Deseret News and on the utahlegals.com website on August 23, 2010, and in the Moab Times-Independent on August 26, 2010 (R.5-6 at ¶¶3-4). Pursuant to Utah Admin. Code R649-5-2.2.12, Westwater provided a copy of its application to all operators, owners, and surface owners within a one-half mile radius of the Subject Well (R.15-16 at ¶4). The published and mailed notice put interested parties, including Living Rivers, on notice as of August of 2010 that an application had been filed and of their need to formulate any objections they might have.

6. The Division received several written responses. The United States Department of Interior, Bureau of Land Management (“BLM”) submitted an August 27, 2010 letter objecting to the application (R.36-37, Exhibit 5), but after meeting with Westwater and reviewing its technical data, the BLM withdrew its objection (R.38-39, Exhibit 5). The Division also received an undated objection letter from an individual named Bill Love (R.6 at ¶5), and a September 15, 2010 advisory letter from the U.S. Fish and Wildlife Service concerning the presence of endangered fish in the Colorado River (R.40-41, Exhibit 6). Finally, on behalf of Living Rivers, Conservation Director John Weisheit submitted an objection and request for hearing via email on September 3, 2010 (R.6 at ¶5). That objection demonstrates that as of September 3, 2010, Living Rivers was



aware of Westwater's application, had requested a hearing thereon, and knew of the need to prepare their opposition.

7. In accordance with the UIC regulations, those objections deprived the Division of the ability to act upon Westwater's application and necessitated a formal evidentiary hearing before the Board. Utah Admin. Code R649-5-3.4.

#### The Formal Hearing Before the Board

8. On October 18, 2010, Westwater filed a "Motion to Convert Informal Adjudicative Proceeding" and a "Request for Agency Action" asking the Board to schedule a formal hearing on December 8, 2010 to review and approve their UIC application (R.1-11). Living Rivers was copied on Westwater's filing (R.3, 14). The matter was noticed and set for hearing in accordance with the Board's rules.

9. Living Rivers enjoyed a slightly longer than normal time frame within which to file a written response to the petition and to submit supporting exhibits in the proceeding below.<sup>5</sup> Living Rivers, however, filed no substantive response or exhibits by the November 24, 2010 deadline for such filings. Instead, on that date, Living Rivers filed a motion to continue the hearing until January 26, 2011 (R.77-79). The motion stated that Living Rivers Conservation Director, Mr. Weisheit (who had authored the September 3, 2010 objection nearly three months earlier), waited until November 22,

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<sup>5</sup> As is more fully discussed in the Board's December 2, 2010 Order Denying Request for Continuance, the Board's altered holiday hearing schedule during the month of December resulted in Living Rivers having approximately one extra week to prepare its written response and exhibits and prepare for the hearing (R.93-94).

2010 to contact counsel about the possibility of representing Living Rivers in this matter (R.77), and that a continuance was sought to allow counsel sufficient time to familiarize themselves with the proceedings and conduct legal research (R.77-78). Living Rivers did not cite the need to consult with an expert or gather other evidence as a reason for the continuance. *Id.*

10. Both the Division<sup>6</sup> and Westwater opposed the continuance motion (R.82-92). Each noted that Living Rivers had been given notice of the application and the scheduled hearing, had been aware of the application and had access to the application materials for months, and had made previous filings before the Board and was aware of the Board's rules and deadlines (R.82-83, 86). The briefs also noted that given the Board's altered November/December holiday schedule, Living Rivers had benefitted from a longer than usual time to prepare, and that because the next Board hearing was not scheduled until January 26, 2011, a continuance would result in an extraordinary delay of seven weeks (R.87-88).

11. On the pleadings before it, the Board found no good cause for the requested continuance and denied the motion by order dated December 2, 2010 (R.93-95).

12. On December 7, 2010, the evening before of the hearing, Living Rivers renewed its request for a continuance through a letter from counsel (R.117-120). Living

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<sup>6</sup> The Division is by rule a party to all proceedings before the Board. Utah Admin. Code R641-101-100.

Rivers again failed to provide good cause<sup>7</sup> to support its motion during oral arguments at the December 8, 2010 hearing, and the Board denied its renewed request (R.206 at 16).

13. Living Rivers' December 7 letter also expressed concerns about the proposed injection well and requested, as an alternative to a continuance, that the Board place certain additional conditions (such as monitoring wells) on the permit (R.117-120). The letter also included a number of technical factual assertions, which Living Rivers' opening brief treats as evidence. *See, e.g.*, Petitioner's Brief at 21, 25-26. However, none of the letter's factual assertions are attributed to an expert, and no affidavit of any expert was attached. The letter is simply signed by counsel for Living Rivers (R.120).

14. At the December 8, 2010 hearing, Westwater offered the sworn testimony of two expert witnesses, David Stewart and David Allin. After hearing evidence of their educational and professional backgrounds and experience, the Board recognized Mr. Stewart as an expert on water chemistry and compatibility of formation water and produced water (R.206 at 19 and 21), and Mr. Allin as an expert in geology and

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<sup>7</sup>Although Living Rivers stated a desire to gather evidence during the requested continuance, it did not claim to have knowledge of any relevant or concrete evidence demonstrating a specific potential problem with the proposed well. Instead, it requested more time to conduct basic inquiries of the kind it should have been conducting since the filing of its objection on September 3, 2010, three months earlier. *See* R.206 at 8 (counsel indicated Living Rivers' desire to gather general hydrological information to "confirm or not confirm" whether there was a potential problem with the project); R.206 at 196 (referencing Living Rivers' desire to consult with a witnesses so it could "explore with him whether or not" any problems with the proposal could be found). Living Rivers did not claim that its potential expert witness had been unavailable over the preceding three months.

hydrology (R.206 at 97-98 and 106).<sup>8</sup> Westwater presented evidence in support of its petition in the form of numerous exhibits and the testimony of these two experts. *See* Statement of Facts at ¶¶ 22-24, 26-32 and 34. The Division also introduced exhibits and called witnesses at the hearing. *See* Statement of Facts at ¶¶ 25 and 35-36.

15. Living Rivers, through counsel, presented argument at the December 8, 2010 hearing and cross-examined witnesses called by the other parties. Living Rivers submitted no exhibits and offered no testimony of its own to substantiate its concerns or to controvert the evidence offered by Westwater and the Division.

16. At the conclusion of the December 8, 2010 hearing and pursuant to its usual practice, the Board deliberated and then announced its decision. The Board granted Westwater's application and directed its counsel to prepare a proposed order (R.206 at 198-199).

17. On January 13, 2011, the Board issued its Findings of Fact, Conclusions of Law and Order (the "Final Order") granting Westwater's requested relief (R.146-159). The Final Order expressly informed Living Rivers and others of their right to seek

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<sup>8</sup> The board heard testimony concerning Mr. Allin's education as well as his experience (including with Class II injection wells) (R.206 at 95-101). *See Randle v. Allen*, 862 P.2d 1329, 1337 (Utah 1993) (recognizing expert witnesses may be qualified on the basis of education or experience). After hearing this testimony and arguments from counsel concerning Mr. Allin's qualifications (R.206 at 95-106), the Board was satisfied that Mr. Allin's background and experience qualified him as an expert in geology and hydrology for purposes of the hearing and recognized him as such (R.206 at 105-106). *See Wessel v. Erickson Landscape Co.*, 711 P.2d 250, 253 (Utah 1985) (recognizing trial court has "considerable discretion in determining whether an expert is qualified to give an opinion on a particular matter" and that the critical factor is whether the witness "can assist the trier of fact in resolving the issues before it").

rehearing, and directed their attention to the specific Board rules governing the requirements for petitions for rehearings (R.156-157 at ¶6).

18. On February 1, 2011, Living Rivers timely filed a Request for Rehearing and Modification of Existing Order, And In the Alternative, Request for A Stay of the Order Issued On January 13, 2011. But despite having been put on notice of the Board's rule governing petitions for rehearing, Living Rivers' motion failed to comply with the requirements of that rule. The motion states Living Rivers' desire to present "additional information" to the Board as the reason for a rehearing (R.161), but the motion was not accompanied by an affidavit addressing the nature of the new information and why it could not with reasonable diligence have been presented at the hearing as required by the Board's rehearing rule. *See* Utah Admin. Code R641-110-200. Although the motion referenced a newly-retained expert, Professor Kip Solomon, the letter included no report or testimony from Professor Solomon. The motion references a recommendation regarding monitoring wells, but did not claim Dr. Solomon had identified any specific problems with Westwater's application. Instead, it merely states that in "preliminary discussions" with Living Rivers, Professor Solomon indicated there were "additional questions that need to be examined" (R.161). Westwater and the Division opposed the motion for rehearing (R.174-189).

19. After considering these memoranda, the Board denied Living Rivers' motion in an order issued on the morning of February 22, 2011 (R.190-194). That same afternoon, Living Rivers filed a Supplement to Request For Rehearing that attached a

report authored by Professor Kip Solomon (R.195-205). This supplemental material was filed after the Board had already issued its Order Denying Motion for Rehearing. *See* Stipulation Concerning Briefing and Motion to Correct Record (filed with this Court on July 15, 2011) at 3. Because the motion to which the supplemental filing pertained had already been denied, the Board did not consider the supplemental filing in ruling on that motion.

## **II. Facts Relevant to Issues Presented for Review.**

20. The permitting of a UIC well is a highly technical matter that follows a specific checklist of regulatory requirements. As noted in the Introduction above, the lack of specificity in Living Rivers' allegations of error<sup>9</sup> necessitated the Board restating that checklist of requirements in this brief and the substantial evidence supporting the Board's findings on those issues. Respondents have therefore set forth in the following paragraphs each of the relevant requirements under the UIC regulations<sup>10</sup> as well as the evidence considered and findings made by the Board. Although this discussion is

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<sup>9</sup> Petitioner's Brief generally references the relevant body of rules (R649-5-2 as a whole), but does not sufficiently identify the particular requirements of those regulations (R649-5-2.2 through R649-2.2.13) Living Rivers claims the Board failed to address, or the factual findings under those regulations it challenges on appeal.

<sup>10</sup> Those requirements are set forth in Utah Admin. Code R649-5-2.1 through R649-5-2.2.13. Petitioners also identify Utah Admin Code R649-5-1 as controlling law in this case. While R649-5-1 does govern "Requirements for Injection of Fluids Into Reservoirs," there is substantial overlap between the requirements of R649-5-1 and the UIC requirements of R649-5-2. The non-overlapping portions R649-5-1 relate to enhanced recovery projects which are not applicable to the Subject Well and application. Consequently, this brief focuses upon the UIC requirements of R649-5-2 and its subparts.

somewhat lengthy and technical, Respondents ask the Court's patience as the following paragraphs are pertinent to the arguments below.

21. Utah Admin. Code R649-5-2.1 sets forth the UIC regulations' overarching mandate that "[i]njection wells shall be completed, equipped, operated, and maintained in a manner that will prevent pollution and damage to any USDW, or other resource and will confine injected fluids to the interval approved." Utah Admin. Code R649-5-2.2 through R649-5-2.2.13 (discussed in paragraphs 22 through 33 below) set forth the numerous specific elements and required findings of the UIC regulations which ensure that this general, overarching mandate is met.<sup>11</sup> The evidence discussed at length below in connection with the specific requirements of the UIC regulations constitutes substantial evidence demonstrating this general mandate was satisfied. The Board made numerous findings pertinent to this overarching mandate (*See* R.150-154 at Finding Nos. 12-23 and 26, Conclusion Nos. 4-5).

22. Utah Admin. Code R649-5-2.2 requires that the injection well application "include a properly completed UIC Form 1." That form was submitted (R.17), and the Board found this requirement had been met (R.147-154 at Finding Nos. 1 and 2, Conclusion Nos. 4-5).

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<sup>11</sup> In its brief, Living Rivers repeatedly cites the broad, overarching mandate set forth in this rule rather than identifying the specific issues and findings under the various subparts of the UIC regulations it alleges the Board failed to address. *See, e.g.*, Petitioner's Brief at 23, 24 and 28.

23. Utah Admin. Code R649-5-2.2.1 requires the applicant to file a plat showing the location of the injection well and all owners, operators and other wells within a one half mile radius of the proposed well. Westwater submitted the required information (R.206 at 23-26 and 150, Exhibit 2, Exhibit 3, Exhibit A to Exhibit 4), and the Board entered findings pertaining to this requirement (R.147-154 at Finding Nos. 1, 7, 8, 9 and 16, Conclusion Nos. 4-5).

24. Utah Admin. Code R649-5-2.2.2 requires “[c]opies of electrical or radioactive logs, including gamma ray logs, for the proposed well run prior to the installation of casing and indicating resistivity, spontaneous potential, caliper, and porosity.” Mr. Allin testified concerning Exhibits 10-1 through 10-4, which comprise a gamma ray log run prior to the installation of casing (R.206 at 128-142, Exhibits 10-1 through 10-4).<sup>12</sup> The Board made findings pertaining to this requirement (R.150-154 at Finding Nos. 12-14 and 26, Conclusion Nos. 4-5).

25. Utah Admin. Code R649-5-2.2.3 requires “[a] copy of a cement bond or comparable log run for the proposed injection well after casing was set and cemented.” Division witness Christopher Kierst testified concerning Division Exhibits 1 and 2, which indicate Westwater provided an acceptable cement bond log (R.206 at 179-80 and 183, Division’s Exhibit 1 (Permit Statement of Basis) at 1-2 (discussing cement bond log and cement program), Division’s Exhibit 2 (UIC Permit Analysis Form)). The Board made

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<sup>12</sup> Utah Admin. Code R649-5-2.2.4 states that “[c]opies of logs already on file with the division should be referenced, but need not be refiled,” but there were no relevant logs already on file with the Division in this matter.



findings respecting this requirement (R.150-154 at Finding No. 13 and 26, Conclusion Nos. 4-5).

26. Utah Admin. Code R649-5-2.2.5 requires “[a] description of the casing or proposed casing program of the injection well and of the proposed method for testing the casing before use of the well.” Mr. Allin testified about the proposed casing program and the various well casing tests Westwater conducted before using the well (R.206 at 142-144, Exhibit 13 at 3-5 (discussing casing program and casing tests), Division’s Exhibit 1 (Permit Statement of Basis) at 1 (describing casing program), Division’s Exhibit 2 (UIC Injection Permit Analysis Form) (reflecting Division’s completed review of casing program and casing tests)). The Board made findings pertaining to this requirement (R.150-154 at Finding No. 13 and 26, Conclusion Nos. 4-5).

27. Utah Admin. Code R649-5-2.2.6 requires “[a] statement as to the type of fluid to be used for injection, its source and estimated amounts to be injected daily.” Evidence was admitted concerning the basins/oilfields from which the injected water will originate (R.206 at 20 and 34-35), Westwater’s testing of incoming produced water and exclusion of water found to contain hydrologic fracturing fluids (R.206 at 35-36, 59 and 91), and the amounts of water to be injected (R.206 at 125-128 and 166-67). The Board made findings pertaining to this requirement (R.152-154 at Finding Nos. 19, 20 and 21, Conclusion Nos. 4-5).

28. Utah Admin. Code R649-5-2.2.7 requires that the applicant provide a standard laboratory analysis of (1) the fluid to be injected, (2) the fluid already present in

the formation, and (3) the compatibility of those fluids. Mr. Stewart testified concerning the required laboratory analysis (R.206 at 45-48 and 51-53, Exhibit 11, Rebuttal Exhibit 1), and responded to Living Rivers concerns regarding reliance on “modeling data,” clarifying that Westwater’s water chemistry figures were derived from samples of actual produced water received at its pilot plant (R.206 at 20, 46 and 51-53). Mr. Stewart testified the injection water was compatible with the water in the Wingate Sandstone (R.206 at 47-48). The Board made findings pertaining to this requirement (R.150-154 at Finding Nos. 14, 18, 19 and 20, Conclusion Nos. 4-5).

29. Utah Admin. Code R649-5-2.2.8 requires the “proposed average and maximum injection pressures” be specified. Mr. Allin testified that Westwater’s step rate test derived a maximum allowable injection pressure of 400 psi (R.206 at 125-128, 144-147 and 149, Exhibit 12), and based on the Division’s recommended 10% reduction to that number, the maximum pressure will be limited to 360 psi (R.206 at 145 and 182-184). The Board made findings pertaining to this requirement (R.152-154 at Finding No. 21, Conclusion Nos. 4-5).

30. Utah Admin. Code R649-5-2.2.9 requires “evidence and data to support a finding that the proposed injection well will not initiate fractures through the overlying strata or a confining interval that could enable the injected fluid or formation fluid to enter any fresh water strata.” Mr. Allin testified concerning Westwater’s step-rate test which established the maximum allowable injection pressure below which there is “no possibility” that the proposed injection operations will initiate fractures allowing

migration of fluid into fresh water strata (R.206 at 125-128, 144-147, 149 and 182-184, Exhibit 12). The Board made findings pertaining to this requirement (R.152-154 at Finding Nos. 17, 18 and 21, Conclusion Nos. 4-5). Although this issue appears to be one of central concern to Living Rivers on appeal, *see* Petitioner's Brief at 2-3 and 26, Living Rivers offered no exhibits, testimony or other evidence at the hearing on this issue. The evidence offered by Westwater and the Division was uncontradicted.

31. Utah Admin. Code R649-5-2.2.10 contains several subparts and requires: appropriate geological data on the injection interval with confining beds clearly labeled; information regarding any nearby USDWs, including the geologic formation name; lithologic descriptions, thicknesses, depths, water quality, and lateral extent; and information relative to geologic structure near the proposed well which may effect the conveyance and/or storage of the injected fluids. Mr. Allin testified concerning each of these categories of geologic and hydrologic information (R.206 at 107-125, 128-138 and 142, Exhibit 7, Exhibit 8, Exhibit 9, Exhibit 10, Exhibit 11).

Mr. Allin's testimony regarding Exhibit 9 demonstrated: 1) the geologic features in the area of the Subject Well slope northwest and down, away from the Colorado River (R.206 at 121-22); 2) there is a 5.8 mile horizontal and 800 foot elevation difference between the injection interval and the nearest outcrop of the Wingate Sandstone near the Colorado River (R.206 at 118-19); 3) water within the Wingate naturally flows laterally and moves toward lower elevations, i.e. it naturally drains downhill (R.206 at 124-25); and 4) the Wingate reservoir has an extremely low natural water pressure (R.206 at 121-

125, Exhibit 9). Considering these factors Mr. Allin testified that even “if you inject, even almost unlimited amounts of injectate, into the formation, its going to be almost impossible to raise the formation pressure of the Wingate Sandstone significantly enough to ever” have the injected water move toward the southeast in the direction of the Colorado River (R.206 at 122-23). In other words, given the geology of the area, “its certainly not going to go uphill” (R.206 at 125). The Board made findings pertaining to the various requirements of this rule (R.150-154 at Finding Nos. 12-15, 17 and 18, Conclusion Nos. 4-5). Although this particular question seems to be of central concern to Living Rivers in this appeal, *see* Petitioner’s Brief at 18-20, Living Rivers offered no exhibits, testimony or other evidence at the hearing on this issue. The evidence offered by Westwater and the Division was uncontradicted.

32. Utah Admin. Code R649-5-2.2.11 requires “[a] review of the mechanical condition of each well within a one-half mile radius of the proposed injection well to assure that no conduit exists that could enable fluids to migrate up or down the wellbore and enter improper intervals.” Westwater’s petition and the testimony of Mr. Allin established that there are three wells within a half-mile radius of the Subject Well, none of which were drilled deep enough to reach the injection formation, and all of which were plugged properly such that fluids will not migrate up or down the wellbore (R.206 at 150). The Board made findings pertaining to this requirement (R.151-154 at Finding Nos. 16 and 17, Conclusion Nos. 4-5).

33. Utah Admin. Code R649-5-2.2.12 requires an affidavit certifying the application was provided to all owners and operators within a one-half mile radius of the well. Westwater submitted required affidavit (Exhibit C to Exhibit 4), and the Board made findings pertaining to this requirement (R.147-154 at Finding Nos. 1 and 2, Conclusion Nos. 4-5).

34. In addition to the evidence offered on the enumerated regulatory requirements set forth above, Westwater witness Allin testified to the following summary points: 1) the Wingate Sandstone, the injection reservoir, is not an underground source of drinking water; 2) there are no water wells within the area of the Subject Well; 3) in his expert opinion the injected fluids will be confined and there will be no communication of the injected fluids with potential sources of underground drinking water in the aquifers above the Wingate Sandstone; 4) there will be no communication with any surface sources of drinking water like the Colorado River; and 5) in summary, “the way the well is configured and regional geology formation pressures . . . convince me it will be impossible to . . . either pollute USDWs or surface drinking water supplies” (R.206 at 151-52). Mr. Allin also testified concerning Exhibit 13, which provides a summary of the various geologic, technical, and operational aspects of the Subject Well and how the application meets the relevant UIC regulations (R.206 at 148, Exhibit 13).

35. At the end of the December 8, 2010 hearing, Living Rivers requested the Division place as a condition on approval of the Subject Well that Westwater not accept

“frac” water (R.206 at 186-190).<sup>13</sup> Counsel for the Division clarified that frac water is a non-exempt RCRA fluid that can be legally injected under the UIC rules and there is no legal requirement to include a “no frac water” condition (R.206 at 186-87). Division witness Brad Hill also noted such a condition would place an additional monitoring and enforcement obligation on the Division (R.206 at 188). The Board considered Living Rivers’ request (R.206 at 189) but did not place an additional condition on the permit concerning “frac” water.

Living Rivers also requested that a condition be placed on the permit requiring that monitoring wells be installed. While R649-5-5.3.3 (cited by Living Rivers) provides that the Board “may” require further testing procedures or devices, this provision is discretionary. The Board heard argument and received and weighed evidence on the monitoring well request (R.206 at 7, 88, 156-59 and 196-97). Division staff testified at the conclusion of the hearing that the Division did not feel any further conditions need be placed on the permit (R.206 at 190). The Board ultimately concluded that all regulatory requirements had been met (R.150-54 at Finding Nos. 12-23 and 26, Conclusion Nos. 3-6) and did not impose any additional conditions on the permit regarding monitoring wells.

36. After reviewing the application and listening to Westwater’s testimony, Division witness Christopher Kierst stated the Division’s conclusion that the applicant had fully satisfied all of the requirements of the UIC rules and recommended the Board approve the permit (R.206 at 179-181).

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<sup>13</sup> See *infra* note 21 for a discussion of “frac” water.

37. Living Rivers participated in the December 8, 2010 hearing by giving argument and conducting cross-examination, but it offered no exhibits, testimony or other evidence on any issue. Westwater's and the Division's evidence on all of the issues was uncontradicted.

### **SUMMARY OF THE ARGUMENT**

The Board acted properly in approving Westwater's injection well application because the Board considered all issues requiring resolution, based its findings upon substantial evidence in light of the whole record before the Board, and properly exercised its discretion to deny Living Rivers' Motion for Rehearing or in the Alternative Motion for Stay of Order. Although in the proceedings below Living Rivers raised a number of concerns through argument by counsel, it failed to present any evidence to substantiate its concerns or to contradict the evidence of Westwater.

### **ARGUMENT**

#### **I. THE BOARD DECIDED ALL ISSUES REQUIRING RESOLUTION UNDER THE CONTROLLING UIC REGULATIONS**

In Point I of its Statement of Issues, Living Rivers argues the Board "failed to decide all of the issues requiring resolution" (invoking Utah Code Ann. §63G-4-403(4)(c)). Petitioner's Brief at 1. Petitioners, however, do not state with specificity which issues requiring resolution the Board allegedly failed to decide. Instead, they claim that the Board "failed to evaluate public health and safety concerns."<sup>14</sup> *Id.*

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<sup>14</sup> Although it is somewhat buried within the argument section of Petitioner's Brief (continued...)

Petitioner's argument is overly broad and generic. The entire body of UIC regulations are written to protect health and safety by requiring applicants to submit detailed information about the proposed well. *See* Statement of Facts ¶¶ 21 through 36. The Board in turn uses that information to critically assess the potential impacts of the well on the human and natural environment. Consequently, there is no distinct requirement corresponding to a "public health and safety" finding because *all* of the UIC rules are aimed at protecting health and safety.

Appellate briefing must sufficiently "enable [the appellate court] to understand . . . what particular errors were allegedly made, where in the record those errors can be found, and why, under applicable authorities those errors are material ones necessitating reversal or other relief." *Burns v. Summerhayes*, 927 P. 2d 197,199 (Utah App.1996) (quoting *Demetropoulos v. Vreeken*, 754 P.2d 960, 962 (Utah App.1988)). Living Rivers' failure to specify which issues the Board allegedly failed to decide shifts the burden onto the Board (and this Court) to analyze each health and safety related issue requiring resolution

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<sup>14</sup>(...continued)

and is not clearly tied to its Point I ("issues requiring resolution") argument, Living Rivers does assert that the Board "did not consider" two issues—those relating to the concerns of "seepage [and] migration of formation waters" and the possibility that "the injection operations may initiate fractures through the overlying strata." Petitioner's Brief at 26. These are the same two questions referenced by Living Rivers in Point II of its Statement of Issues (concerning whether the Board's findings are supported by substantial evidence). To the extent these two questions also form a part of Living Rivers' Point I (issues requiring resolution) argument, the Board refers the Court to Section II, below, which discusses the evidence the Board considered and the findings the Board made in resolving these issues. *See also* Statement of Facts at ¶¶ 24-32 and 34 (summarizing the evidence considered and the findings made by the Board on each of these issues).



under the UIC regulations to confirm it was decided by the Board. The Board submits that this lack of specificity would permit this Court to decide this issue against Living Rivers on this basis alone. *See Rappleye v. Rappleye*, 2004 UT App 290, ¶41, 99 P.3d 348 (declining to address argument where overall analysis of issue in brief “shift[ed] the burden of research and argument to the reviewing court”) (quoting *State v. Thomas*, 961 P.2d 299, 305 (Utah 1988)). *See also Allen v. Friel*, 2008 UT 56, ¶7, 194 P.3d 903 (noting where “appellant fails to allege specific errors of the lower court, the appellate court will not seek out errors in the lower court’s decision”).

Though not obligated to do so, to demonstrate to the Court that the Board decided all issues, the Board has set forth a discussion of each regulatory requirement in paragraphs 21 through 36 of the Statement of Facts, above. Those paragraphs reference each of the applicable regulations, provide a summary of the substantial evidence in the record presented on each issue, and reference the Board’s findings on each issue. That summary demonstrates the Board properly received and weighed evidence, made findings, and decided each issue requiring resolution under the controlling UIC regulations. In addition, the Board received evidence regarding and considered Living Rivers’ request that special conditions be placed on the permit pertaining to monitoring wells and the injection of “frac” water.<sup>15</sup> See Statement of Facts at ¶35.

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<sup>15</sup> Living Rivers asserts the Board abused its discretion in not imposing a special monitoring well requirement given the alleged presence in the record of evidence indicating the Subject Well will initiate fractures through the overlying strata or enable injected fluid and formation fluid to enter the Colorado River. Petitioner’s Brief at 2-3. As discussed at length in Section II, however, the record contains no such evidence and instead supports the Board’s

(continued...)

## II. THE BOARD'S FACTUAL FINDINGS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE WHICH LIVING RIVERS FAILED TO MARSHAL

In Point II of its Statement of Issues, Living Rivers challenges the Board's factual findings on two questions: whether injected water "may initiate fractures through the overlying strata" and escape the injection formation, and whether the injection operations will "enable the injected fluid or formation fluid to enter the Colorado River."

Petitioner's Brief at 2-3. *See also* Petitioner's Brief at 18, 23 and 26 (identifying the same two factual issues but not analyzing those claims in any detail).<sup>16</sup>

The Board's factual findings will be upheld if they are supported by substantial evidence, which is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *WWC Holding Co., Inc. v. Public Service Comm'n*, 2002 UT 23, ¶8, 44 P.3d 714. Substantial evidence exists when the factual finding is supported by "more than a mere scintilla of evidence . . . though something less than the weight of the evidence." *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter Day Saints*, 2007 UT 42, ¶35, 164 P.3d 384 (quoting *Grace Drilling Co. v. Bd. of Review of Indus. Comm'n*, 776 P.2d 63, 68 (Utah App.1989)). Under the substantial evidence test,

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<sup>15</sup>(...continued)

findings that no fracturing or migration of fluids into the Colorado River will occur.

<sup>16</sup> Although Living Rivers' Point II (challenged factual findings) argument is better delineated than its Point I (issues requiring resolution) argument, Petitioner's Brief is still not entirely clear in identifying precisely which factual findings are being challenged on appeal. While Petitioner's Brief references the two factual issues stated above, and less clearly a third issue addressed below, it never refers to any of the specific factual findings set forth in the Board's Final Order.

“examining the Board’s findings of fact does not constitute a de novo review or a reweighing of the evidence.” *Larson Limestone Co. v. Div. of Oil, Gas and Mining*, 903 P.2d 429, 430-31 (Utah 1995). Rather, the Court is to “defer to the Board’s assessment of conflicting evidence.” *Salt Lake Donated Dental Serv., Inc. v. Dept. of Workforce Serv.*, 2011 UT App 7, ¶14, 246 P.3d 1206 (quoting *Albertson’s, Inc. v. Dept. of Emp’t Sec.*, 854 P.2d 570, 575 (Utah App.1993)).

As discussed below, the record before the Board contained only Westwater’s and the Division’s uncontradicted evidence. This evidence, which Living Rivers failed to marshal, amply supports the Board’s findings on these factual issues.

**A. The Record Before the Board Contains Only Uncontradicted Evidence Submitted by Westwater and The Division.**

This Court reviews challenged findings in light of the "whole record" before the Board. *Grace Drilling Co. v. Bd. of Review of Indus. Comm’n*, 776 P.2d 63, 68 (Utah App.1989). The “whole record” includes all evidence introduced and admitted at the hearing, but does not include evidence that was excluded or, much less, evidence never offered at trial but only submitted after the Board’s decision was made. *See Salt Lake Donated Dental Serv., Inc. v. Dep’t of Workforce Serv.*, 2011 UT App 7, ¶12, 246 P.3d 1206 (appellate court refused to consider untimely filed affidavits submitted in connection with motion for reconsideration below when determining whether Board’s decision was supported by substantial evidence); 4 C.J.S. *Appeal and Error* § 565 (June 2011) (“For evidence to be considered by an appellate court, the evidence must appear in the record on appeal. Documents and exhibits introduced into evidence at trial are a part

of the record . . . Exhibits not offered at trial and affidavits created after the fact are not properly part of the record on appeal, and as far as appellate review is concerned, these documents do not exist"). The record before the Board and thus before this Court includes only the exhibits and testimony adduced by Westwater and the Division and admitted into evidence at the hearing discussed in the Statement of Facts, above. Importantly, two items Living Rivers repeatedly refers to in its Petitioner's Brief do not constitute evidence forming part of the "whole record" for purposes of the substantial evidence test.

**1. Statements of counsel are not evidence.**

Living Rivers repeatedly refers to statements made by its counsel Mr. Shea as if they were evidence. *See* Petitioner's Brief at 21 and 25-26 (citing statements made in counsel's December 7, 2010 letter found in the record at R.117-120). Those statements, which contain factual, technical assertions about "injected fluid [migrating] upwards against the dip of the Wingate" formation, "bedding planes to the south [being] fractured by the Uncompaghre Uplift creating the possibility that a pressurized aquifer (360 PSI) could seep through these fractures," and a number of other geologic and hydrologic issues, are statements of counsel alone. *Id.* Living Rivers offered no testimony or evidence at the hearing below to validate those assertions. Similarly, Living Rivers cites to its counsel's statements at the December 8, 2010 hearing as if they constituted evidence. *See* Petitioner's Brief at 21 (referencing statements of counsel at the December

8, 2010 hearing concerning the alleged threat of H<sub>2</sub>S gas affecting a helium deposit<sup>17</sup> on federal land).

While such assertions by counsel can be treated as statements of Living Rivers' concern, or as argument, they do not constitute evidence. *See Smith v. Workforce Appeals Bd., Dep't Of Workforce Serv.*, 2011 UT App 68, ¶7 n.4, 252 P.3d 372 (noting statements by counsel in brief do not constitute evidence and review of appellate court is limited to evidence in the record) (citing *State v. Leber*, 2009 UT 59, ¶16, 216 P.3d 964)). In the absence of actual evidence, this Court must disregard the stated "concerns" of Living Rivers' counsel.<sup>18</sup>

**2. Dr. Solomon's late-filed letter was never evidence before the Board.**

Living Rivers repeatedly refers to statements made by Dr. Kip Solomon in a letter Living Rivers filed with the Board late in the day on February 22, 2011 as an attempted "supplement" to its February 1, 2011 Motion for Rehearing. *See* Petitioner's Brief at 22 and 27-28. The contents of Dr. Solomon's letter cannot be considered admitted evidence which forms a part of the record before the Board for two reasons. First, Dr. Solomon's statements appear in the form of a letter, not an affidavit or other form of sworn

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<sup>17</sup> To the extent counsel's statements touched upon the concerns expressed by the BLM in its August 27, 2010 letter concerning the helium deposit on federal land, the Board notes that after meeting with Westwater and reviewing additional data, the BLM withdrew its objections to the Subject Well via letter dated September 20, 2010 (both of the BLM's letters are contained within Exhibit 5).

<sup>18</sup> In its Final Order, the Board distinguished Westwater's and the Division's evidence from Living Rivers' statements of concern (R.153 at ¶22).

testimony. Second and most importantly, not only was the letter filed 2.5 months after the evidentiary hearing and more than 1 month after the Board's Final Order, it was filed *after* the Board had already issued its ruling denying the motion for rehearing. *See* Statement of Facts at ¶19. The letter simply was not before the Board prior to the challenged rulings, and could not have been considered in connection with those rulings. The letter was not admitted into evidence and is thus not part of the “whole record” before the Board for purposes of the substantial evidence test.<sup>19</sup> The Board included the letter within the paginated “record” transmitted to this Court only because it was *filed* by a party below.<sup>20</sup>

Although neither counsel’s factual assertions, nor Dr. Solomon’s late-filed letter constitute evidence submitted to the Board when the evidentiary record was open, Living Rivers erroneously characterizes those things as “substantial evidence and data” in challenging the Board's findings. Petitioner’s Brief at 18. This Court must review the

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<sup>19</sup> Utah Courts have clarified that the “whole” record encompasses both the evidence *supporting*, as well as all evidence *contradicting* or casting doubt upon, the challenged findings. *Grace Drilling Co.*, 776 P.2d at 68. The reported decisions, however, do not treat the “whole record” as encompassing evidence that was never offered or admitted, or evidence submitted *after* the hearing was held and the final decision was made. *Id.*

<sup>20</sup> In *Salt Lake Donated Dental Services*, this Court rejected an argument that a Board’s acceptance and time-stamping of a filed affidavit, and later inclusion of it in the transmitted record on appeal, made such affidavit part of the “record” for purposes of the substantial evidence test. 2011 UT App 7, ¶12 n3 (“mere fact that affidavits were attached to a denied request for reconsideration and thus found their way into the Board’s file and in turn into the record on appeal does not establish that the Board did, or was required to, consider them . . . [s]uch a rule would place the question of admissibility in the hands of individual parties”).

challenged findings in light of the evidence that was actually before the Board when those findings were made. *See Salt Lake Donated Dental Serv.*, 2011 UT App 7, ¶12; 4 C.J.S. *Appeal and Error* § 565. As discussed below, only the uncontradicted evidence of Westwater and the Division was before the Board, and the two findings challenged by Living Rivers are amply supported by this evidence.

**B. The Board's Finding That Injection Would Not Initiate Fractures Through Overlying Strata is Supported by Substantial Evidence.**

As set out in the Statement of Facts above, Westwater presented extensive evidence demonstrating that the injection formation, the Wingate Sandstone, and the surrounding confining geologic layers, are competent to accept injection of water into the Wingate at the approved injection pressures. *See* Statement of Facts at ¶¶ 24, 27, 29-31 and 34. That evidence came in the form of exhibits concerning the geology of the area, the composition, thicknesses, depths and other characteristics of the injection formation and surrounding geologic zones, and expert testimony concerning the same (R.206 at 113-125 and 128-142, Exhibit 8, Exhibit 9, Exhibits 10-1 through 10-4). That the Wingate was competent to accept injection water at the approved pressures was confirmed through step rate testing designed specifically for this purpose which established a maximum injection pressure below which fracturing would not occur (R.206 at 125-128, 144-47, 149 and 182-85, Exhibit 12). Moreover, Westwater's witness and the Division's geologist testified concerning the further ten percent (10%) downward adjustment the Division makes to this maximum allowable pressure to build in extra

assurance that fracturing cannot occur (R.206 at 145 and 183-84). This adjusted pressure (360 PSI) became the maximum pressure authorized by the Board in its Final Order (R.155 at ¶3). The Division's technical staff reviewed and was satisfied with the evidence presented by Westwater on this permit issue (R.206 at 179-80, Division's Exhibits 1 and 2). Although it conducted cross-examination and gave argument on this point through counsel, Living Rivers presented no exhibits, testimony or other evidence to substantiate its concerns on this point at the hearing.

Of note is the fact that Living Rivers failed to marshal any of the substantial evidence the Board set forth above and in the Statement of Facts in paragraphs 24, 27, 29-31 and 34. Instead, Living Rivers states that "the only evidence presented in contravention to the possibility of fractures was that 'frac flow back water' was not to be injected." Petitioner's Brief at 26. That statement not only fails to mention any of the relevant, substantial evidence set forth above, it refers to an issue (injection of frac flowback water)<sup>21</sup> related to water compatibility, and not related to whether injection may cause fracturing of the overlying strata. Living Rivers' failure to marshal the evidence supporting the Board's finding on this issue should be fatal to its argument. *See Martinez*

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<sup>21</sup> Frac flow-back water refers to water produced by an oil or gas well which contains fluids previously used in an intentional hydrolic fracturing operation designed to stimulate oil and gas production. The issue of whether such water could potentially end up being delivered to the subject facility for treatment or disposal (and potentially be injected into the Subject Well) is a question relating to the compatibility of the injected fluid with the existing water in the target formation. It relates to *what kind* of water might be injected into the Subject Well. It does not relate to the *rates or pressures* of injection and whether such rates and pressures might fracture the confining strata overlying the injection formation.



*v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 2007 UT 42, ¶¶17 and 19, 164 P.3d 384 (“To successfully challenge an agency’s factual findings, the party ‘must marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence’ . . . parties that fail to marshal the evidence do so at the risk that the reviewing court will decline, in its discretion, to review the trial court’s factual findings”)(quoting *Grace Drilling Co.*, 776 P.2d at 68).

In any event, the substantial evidence marshaled by the Board amply supports its finding that “the proposed injection well and pressures will not initiate or cause fractures in the Wingate or the confining intervals that would allow the injected fluids or formation fluids to enter a fresh water aquifer or USDW” (R.152 at ¶17).

**C. The Board’s Finding That Injection Will Not Cause Discharge of Water at Outcrops of The Wingate Formation Near The Colorado River is Supported by Substantial Evidence.**

Extensive evidence was adduced at the hearing concerning whether injection will create pressure and cause water to move uphill within the injection formation and appear at outcrops near the Colorado River. *See* Statement of Facts at ¶¶ 24, 27, 29, 31 and 34. The Board received exhibits and heard testimony concerning the area’s geology and the composition, thicknesses, depths and other characteristics of the injection formation and surrounding geologic zones (R.206 at 113-116, 121-125 and 128-142, Exhibit 8, Exhibit 9, Exhibits 10-1 through 10-4). The evidence demonstrated that the geologic features in the area tilt away from the Wingate outcrops near the Colorado River, which are located

some 800 feet higher than, and 5.8 miles away from, the point where the Subject Well intersects the Wingate Formation (R.206 at 118-25, Exhibit 9). The evidence also demonstrated that water within the Wingate formation flows laterally and downhill, and will move in the opposite direction of the outcrop near the Colorado River. *Id.* Expert testimony established that injection operations cannot raise pressures within the Wingate formation sufficiently to cause the water to move uphill against the dip (or tilt) of the formation (R.206 at 122).

The Division's technical staff reviewed and was satisfied with the evidence Westwater presented on this issue (R.206 at 179-80, Division's Exhibits 1 and 2). Although Living Rivers' counsel gave argument and expressed Living Rivers' concern on this point, Living Rivers presented no exhibits, testimony or other evidence to substantiate its concerns at the hearing.

As with the fracturing issue discussed above, Living Rivers failed to marshal any evidence beyond the assertions of counsel to challenge the Board's findings. This Court should uphold and decline to review the Board's findings on this issue for this reason, regardless of the marshaling of substantial evidence set forth by the Board above. *See Martinez*, 2007 UT 42, ¶¶17 and 19.

In the end, the evidence demonstrated conclusively that injected fluid will not enter the Colorado River. Living Rivers presented no countervailing evidence, and made no plausible case that there is any risk associated with this issue.

**D. The Board's Other Technical Findings Are Supported By Substantial Evidence.**

Living Rivers briefly mentions a third factual issue—that the injection water composition data submitted to the Board was based only on "modeling," and was therefore insufficient to allow the Board to find that the injection fluid is compatible with the formation fluid as required under Utah Admin. Code R649-5-2.2.7. Petitioner's Brief at 26. As discussed in the Statement of Facts, however, Westwater witness Allin clarified that the data submitted were based on laboratory analysis of actual water samples received at its pilot plant from the basins the injected water will originate from, and that analysis of the injection water and the formation water confirmed their compatibility. *See* Statement of Facts at ¶28. Again, while Living Rivers cross-examined Mr. Allin and gave argument concerning its view of the sufficiency of Westwater's evidence, it offered no evidence of its own on this question.

As discussed above, the record before the Board contained only the uncontradicted evidence of Westwater and the Division. That evidence, which Living Rivers failed to marshal, amply supports the Board's findings on the issues referenced by Living Rivers in its brief.

**III. THE BOARD PROPERLY EXERCISED ITS DISCRETION TO DENY THE MOTION FOR REHEARING**

The Board's ruling on Living Rivers' request for rehearing is reviewed for abuse of discretion, and will be disturbed only if it exceeds the bounds of reasonableness and rationality. *See Wasatch Oil & Gas, LLC v. Reott*, 2011 UT App 152, ¶8, 682 Utah Adv.

Rpt. 50 (reviewing trial court decision concerning whether to reconsider its ruling for abuse of discretion); *Grace Drilling Co.*, 776 P.2d at 70 (applying abuse of discretion review to agency decision not to reopen record to take additional evidence and reconsider its prior ruling).<sup>22</sup>

Requests for reconsideration or rehearing before the Board are governed by the Utah Administrative Procedures Act (“UAPA”) and the Board’s procedural rules. UAPA provides that “[w]ithin 20 days after the date that an order is issued . . . any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.” Utah Code Ann. §63G-4-302(1)(a). The Board’s procedural rules state that if a petition for rehearing “is based upon newly discovered evidence, then the petition will be accompanied by an affidavit setting forth the nature and extent of such evidence, its relevancy to the issues involved, and a statement that the party could not, with reasonable diligence, have discovered the evidence prior to the hearing.” Utah Admin. Code R641-110-200.

Although all parties are charged with knowledge of these statutory and regulatory requirements, the Board’s Final Order explicitly referenced these provisions and notified Living Rivers of what it needed to do to appropriately seek rehearing (R.155-56 at ¶6).

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<sup>22</sup> The “substantial evidence” standard that Living Rivers references in connection with this issue, Petitioner’s Brief at 4, governs judicial review of challenged factual findings. The substantial evidence standard does apply to judicial review of the Board’s denial of a motion for reconsideration or rehearing.

Despite this notice, Living Rivers failed to comply with the rules governing requests for rehearing in several important ways.

First, although Living Rivers based its rehearing motion on a desire to present new evidence (including possible expert testimony of Dr. Kip Solomon)<sup>23</sup>, it did not offer, or even claim to possess, any definite or concrete evidence from Dr. Solomon at the time its motion was filed. Instead, Living Rivers' motion vaguely states that "in a preliminary discussion Dr. Solomon indicated there are additional questions that need to be examined" (R.161 at ¶3). The motion did not state Dr. Solomon had identified any specific problems with the application or with Westwater's evidence, and no affidavit or other material from Dr. Solomon was attached. It therefore failed to describe the nature, extent and relevance of the evidence as required by the Board's rule.

Second, in violation of the Board's procedural rules, Living Rivers' motion failed to address why Living Rivers "could not, with reasonable diligence, have discovered the evidence prior to the hearing." Utah Admin. Code R641-110-200. This rule serves the important purpose of preserving the tribunal's resources and avoiding unnecessary rehearings when evidence was obtainable prior to the original hearing. In upholding an administrative Board's refusal to consider new evidence in connection with a request for

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<sup>23</sup> In its Request for Rehearing, Living Rivers referenced two pieces of new information or evidence. The first was a memo to Grand County addressing questions of county land use and zoning authority unrelated to the issues before the Board (R.169-71). The second was potential expert testimony from Dr. Kip Solomon. As discussed above, however, Living Rivers' did not attach a report from Dr. Solomon to its Request for Rehearing, and its statements concerning the testimony Dr. Solomon might later give were vague.

reconsideration, this Court noted that “if a party were free to reshape its case, so long as it did so within 20 days after a decision, the administrative process would never end.” *Salt Lake Donated Dental Serv.*, 2011 UT App 7, ¶12 (quoting *Western Water, LLC v. Olds*, 2008 UT 18, ¶31, 184 P.3d 578)). Here, Living Rivers was aware of the subject injection well application and had actually filed an objection to it in early September 2010, more than three months before the hearing. *See* Statement of Facts at ¶6. Living Rivers had ample time to prepare for the December 8, 2010 hearing, and was obligated by the Board’s rules to address why the expert opinion it sought to offer in requesting a rehearing could not have been obtained earlier.

Utah courts have upheld denials of motions for reconsideration or rehearing under similar circumstances. *See Timpanogos Hosp. v. Labor Comm’n.*, 2011 UT App 106, ¶5, 251 P.3d 855 (upholding Labor Commission’s refusal to reopen a hearing because proffered new evidence was “unreasonably late and too insubstantial to warrant reopening the evidentiary proceeding”). *See also Grace Drilling Co.*, 776 P.2d at 70 (Industrial Commission’s refusal to reopen record was not an abuse of discretion where employer had “had ample opportunity to present its case and failed to meet its burden”).

Thus, both the vague description of Dr. Solomon’s proffered opinion that “additional questions [needed] to be examined,” as well as the failure to address why the expert testimony could not have been obtained prior to the hearing, violated the regulations applicable to requests for rehearing and warranted denial of the motion.

Finally, even if Living Rivers possessed a valid reason for not having submitted Dr. Solomon's letter at the December 8, 2010 hearing, Living Rivers' submission of that letter was untimely even within the context of the briefing schedule on its post-trial motion for rehearing. Living Rivers' original Motion for Rehearing was timely filed, but contained only a vague statement that Living Rivers had spoken with an expert who felt there were "additional questions that need to be examined" (R.161 at ¶3). It was not until *40 days* after the Board's Final Order that Living Rivers attempted to "supplement" its motion by submitting Dr. Solomon's letter. This was nearly eight weeks after the December 8, 2010 hearing at which Living Rivers first represented it had spoken with (apparently) the same university professor, and needed "two weeks" to obtain and submit evidence from him (R.206 at 195-96). Living Rivers' late filing violated the 20-day deadline for motions for rehearing set forth in Utah Code Ann. §63G-4-302(1). In fact, Living Rivers filed Dr. Solomon's letter so late that it actually occurred after the Board had denied Living Rivers' rehearing request. *See* Statement of Facts at ¶19. The Board therefore did not (and could not have) considered the Dr. Solomon letter in connection with its ruling on Living Rivers' Motion for Rehearing.

Ultimately, the Board properly exercised its discretion to deny Living Rivers' Motion for Rehearing because (1) the motion made only vague reference to "additional questions" Living Rivers wished to explore with an expert, (2) the motion failed to address why Living Rivers could not have obtained the expert evidence earlier as required by the Board's rules, and (3) because the supplement to that motion came in well after the

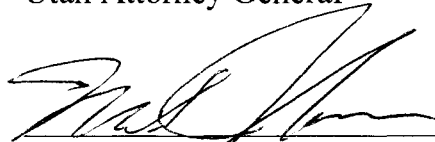
20-day deadline for requests for reconsideration and subsequent even to the Board's written order denying the motion.

### **CONCLUSION**

For the reasons set forth above, Respondents Board of Oil, Gas and Mining and Division of Oil, Gas and Mining respectfully request that the Court affirm the Board's decision to grant the injection well permit under appeal as well as its decision to deny the Request for Rehearing of Living Rivers below.

Respectfully submitted this 5<sup>th</sup> day of August, 2011.

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Utah Attorney General



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and Mining*



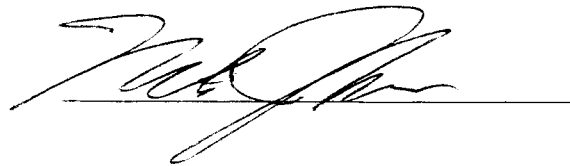
## CERTIFICATE OF MAILING

I hereby certify that on the 5<sup>th</sup> day of August, 2011, two copies of the foregoing **BRIEF OF APPELLEES BOARD OF OIL, GAS AND MINING AND DIVISION OF OIL, GAS AND MINING** were mailed, first class, postage prepaid, to each of the following:

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## **ADDENDA**

- Addendum 1: Findings of Fact, Conclusions of Law, and Order
- Addendum 2: Utah Code Ann. §40-6-5
- Addendum 3: Utah Admin. Code R649-5-1 and  
Utah Admin. Code R649-5-2
- Addendum 4: Utah Code Ann. §63G-4-302(1)(a)
- Addendum 5: Utah Admin. Code R641-110-200
- Addendum 6: Utah Code Ann. §63G-4-403

## Addendum 1: Findings of Fact, Conclusions of Law, and Order

**FILED**

**JAN 13 2011**

**BEFORE THE BOARD OF OIL, GAS AND MINING**

**SECRETARY, BOARD OF  
OIL, GAS & MINING**

**DEPARTMENT OF NATURAL RESOURCES**

**STATE OF UTAH**

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**IN THE MATTER OF THE )  
APPLICATION OF WESTWATER )  
FARMS, LLC FOR ADMINISTRATIVE )  
APPROVAL OF THE HARLEY DOME )  
1 SWD WELL LOCATED IN SECTION )  
10, TOWNSHIP 19 SOUTH, RANGE 25 )  
EAST, S.L.M., GRAND COUNTY, )  
UTAH, AS A CLASS II INJECTION )  
WELL )**

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**FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND  
ORDER**

**Docket No. 2010-029**

**Cause No. UIC-358.1**

This Cause came on regularly for hearing before the Utah Board of Oil, Gas, and Mining (the "Board") on Wednesday, December 8, 2010, at the hour of 9:00 a.m. in the Auditorium of the Department of Natural Resources, 1594 West North Temple, Salt Lake City, Utah. The following Board members were present and participated at the hearing: Douglas E. Johnson, Chairman, Samuel C. Quigley, Jake Y. Harouny, Ruland J. Gill, Jr., Kelly L. Payne, and James T. Jensen. John R. Baza, Director, and John Rogers, Associate Director--Oil and Gas, were present for the Utah Division of Oil, Gas and Mining (the "Division"). The Board was represented by Michael S. Johnson, Assistant Attorney General.

The petitioner, Westwater Farms, LLC, was represented by Thomas W. Clawson of Van Cott, Bagley, Cornwall & McCarthy, and David R. Stewart, Environmental Engineer, and David L. Allin, Geologist, testified on behalf of the petitioner.

The Division was represented by Emily Lewis, Assistant Attorney General, and Christopher J. Kierst, UIC Permitting Specialist, and Brad Hill, Permitting Manager and Geologist,

testified on behalf of the Division. The Division filed its Staff Memorandum to the Board on November 8, 2010.

Respondent Living Rivers was represented by Patrick A. Shea and Jacque M. Ramos. On November 24, 2010, along with a Notice of Appearance, Living Rivers filed a Motion to Continue Hearing on Notice of Agency's Action. By Order dated December 2, 2010, the Board denied Living River's motion. By letter dated December 7, 2010, and by motion made at the December 8, 2010 hearing, Living Rivers again requested that the hearing be continued, or in the alternative, that certain conditions be attached and incorporated into the UIC permit for the Subject Well (as defined herein) ("Living River's Second Motion to Continue").

No other persons or parties appeared at or participated in the hearing.

The Board, having fully considered the testimony adduced and the exhibits received into evidence at the December 8, 2010 hearing, being fully advised, and good cause appearing, hereby makes the following findings of fact, conclusions of law, and order:

#### **FINDINGS OF FACT**

1. Westwater Farms, LLC ("Westwater") originally filed its application for administrative approval of the Harley Dome #1 SWD Well located in the NW¼NE¼ of Section 10, Township 19 South, Range 25 East, S.L.M., Grand County, Utah (the "Subject Well" and "Subject Lands," respectively) as a Class II underground injection well for the disposal of produced water on May 26, 2009. Westwater provided a copy of the application to all operators, owners, and surface owners within a one-half mile radius of the Subject Well as required by Rule R649-5-2(12), Utah Administrative Code ("U.A.C.").

2. Westwater's original application was amended and augmented with supplemental information filed with the Division during the summer of 2010 (together with the

original application, the “Application”). On August 23, 2010 and pursuant to Rule 649-5-3(2), U.A.C., the Division published notice of the Application in the Salt Lake Tribune, Deseret News, newspapers of general circulation in Salt Lake City and Salt Lake County. Notice also was published on the website utahlegals.com. In addition, on August 26, 2010, the Division published notice of the Application in the Moab Times-Independent, a newspaper of general circulation in Emery, Grand, and San Juan Counties.

3. Following publication of the notice of the Application, the Division received a letter dated August 27, 2010, from the United States Department of the Interior, Bureau of Land Management (“BLM”) objecting to the Application, and another undated letter (received by the Division on September 7, 2010) from Bill Love, an individual, also objecting to the Application. The Division also received an objection to the Application by email dated September 3, 2010, from John Weisheit on behalf of Living Rivers. The Division also received an advisory letter dated September 15, 2010, which included a request for water analysis and monitoring program, from the United States Department of the Interior, Fish and Wildlife Service (“FWS”). The BLM withdrew its objection by letter dated September 30, 2010.

4. Based on the protests filed in this Cause and pursuant to Rule R649-5-3(4), U.A.C., Westwater filed its Request for Agency Action (the “Request”) and a Motion to Convert Informal Adjudicative Proceeding in accordance with Rule R649-10-1(2), U.A.C. The stated purpose of the Request was to set the matter for hearing by the Board at the Board’s regularly scheduled hearing on December 8, 2010. By Order dated November 8, 2010, the Division converted the proceeding to a formal proceeding.

5. Notices of the time, place, and purposes of the Board’s regularly scheduled December 8, 2010 hearing were mailed to all interested parties by first-class mail, postage prepaid,

and were duly published in the Salt Lake Tribune, Deseret Morning News, and the Moab Times Independent pursuant to the requirements of Rule R641-106-100, U.A.C. Copies of the Request were mailed or emailed by Westwater to all interested parties, including Living Rivers, Bill Love, and the FWS, pursuant to Rule R641-104-135, U.A.C.

6. Westwater is a Utah limited liability company in good standing, having its principal place of business in Cisco, Utah. Westwater is qualified to do and is doing business in Utah.

7. Westwater owns fee simple title to the lands upon which the Subject Well is located. Westwater owns all of the Subject Lands except a triangular-shaped parcel located in the southeast corner of subject Section 10, which is owned by Mid-America Pipeline Company, as depicted on Exhibit 3, which was introduced and admitted at the hearing.

8. Besides Westwater, the surface owners within a one-half mile radius of the Subject Well include the United States of America, State of Utah, and Mid-America Pipeline Company. Grand County and the Federal Highway Administration own the surface rights, based on rights-of-way or easements, to old Highway 6 & 50 and Interstate 70, respectively. The subject federal public lands are administered by the BLM, and the Utah State lands are administered by the Utah School and Institutional Trust Lands Administration ("SITLA").

9. Portions of the oil and gas minerals in the lands embraced within the Subject Lands and within a one-half mile radius of the Subject Well are subject to United States of America Oil and Gas Leases Nos. UTU-70176 and UTU-82619, and Utah State Mineral Lease No. ML-49255. The other oil and gas minerals are unleased. As of September 9, 2010, Shiprock Helium, LLC owned the leasehold rights under UTU-70176, and Petro Resource Corp. owned the leasehold rights under UTU-82619. Retamco Operating, Inc. owns the leasehold rights under ML-49255.

The federal oil and gas leases are administered by the BLM, and the Utah State minerals are administered by SITLA.

10. The Application for Permit to Drill ("APD") for the Subject Well was filed with the Division on June 1, 2009, and the APD was approved by the Division on December 1, 2009. The Subject Well was spud on May 13, 2010, and completed as an injection well on July 13, 2010.

11. Westwater will operate the Subject Well and the proposed injection operations.

12. The formation to be approved by the Board for water injection disposal operations is the Wingate Sandstone Formation ("Wingate"). In the vicinity of the Subject Lands, the Wingate is an aeolian sandstone deposit approximately 337 feet thick. The Wingate is a porous reservoir and is capable of accepting the volume of produced water proposed to be injected by Westwater.

13. The entire stratigraphic interval of the Wingate between 1,342 feet to 1,679 feet is proposed to be used for injection purposes accessed through casing perforations made in the Subject Well between 1,344 feet to 1,631 feet. Those intervals are mechanically isolated from the formations above and below the Wingate.

14. The Kayenta Formation ("Kayenta"), which directly overlies the Wingate, will act as the hydrologic boundary (confining layer) above the injection intervals, and the Chinle Formation ("Chinle"), which underlies the Wingate, will act as the hydrologic boundary below the injection intervals. The Kayenta is approximately 199 feet thick in the vicinity of the Subject Well and is a resistant, impervious formation composed of interbedded shale and sandstone layers with high clay content. Water



salinity samples taken from the Subject Well show that the Kayenta acts as a hydrologic barrier between the Wingate and the Entrada Sandstone Formation, which directly overlies the Kayenta. The Chinle is approximately 138 feet thick at the nearest control point in a plugged and abandoned oil and gas test well located 1.1 miles to the northwest of the Subject Well. The Chinle is a coastal plain shale deposit which demonstrates practically no permeability due to its high clay content. Both the Kayenta and Chinle are competent hydrologic barriers, and therefore, comprise upper and lower hydrologic seals to the aquifer in the Wingate.

15. The Wingate is not currently, nor is it ever expected to be, an underground source of drinking water ("USDW"). The Cedar Mountain, Morrison, Summerville, Entrada, Kayenta, and Chinle Formations in the vicinity of the Subject Well also are not USDW.

16. The following wells have been drilled and/or completed within a one-half mile radius of the Subject Well:

a. Elizondo Water Well situated in the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 10, Township 19 South, Range 25 East. The well did not penetrate the Wingate and was plugged and abandoned in June 1965.

b. Lansdale Government #5 Well situated in the NE $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 10, Township 19 South, Range 25 East. The well did not penetrate the Wingate and was plugged and abandoned in March 1968.

c. Lansdale Government #10-31-A Well situated in the NE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 10, Township 19 South, Range 25 East. The well did not penetrate the Wingate and was plugged and abandoned in August 1975.

17. Westwater's evidence demonstrated that (i) there are no geologic structures near the Subject Well that will allow the injected fluids to migrate to an USDW; (ii) the Wingate is competent to contain the injected fluids and prevent migration to any USDW, and that it will remain competent under the injection pressures and operations; (iii) the proposed injection well and pressures will not initiate or cause fractures in the Wingate or the confining intervals that would allow the injected fluids or formation fluids to enter a fresh water aquifer or USDW; and (iv) there are no wells within a half-mile radius of the Subject Well that would provide a conduit that would allow the injected or formation fluids to migrate up or down a wellbore and enter improper intervals, such as a fresh water aquifer.

18. There are no fresh water aquifers within a half-mile radius of the Subject Well.

19. The water to be injected into the Subject Well will come from oil and gas producing wells in the Uintah Basin, Paradox Basin, the San Rafael Swell and Book Cliff areas, including the Greater Cisco Field in Utah, and sources in the Piceance Basin in western Colorado. There is a need for produced water disposal facilities for these producing basins.

20. The produced water to be injected into the Subject Well will be tested and treated before it is injected to be certain that it is compatible with the formation water in the Wingate.

21. Westwater will inject approximately 6,500 barrels of produced water per day into the Subject Well at an average injection pressure of 330 pounds per square inch ("psi") with a maximum injection pressure of 360 psi. The maximum pressure is based on the results of step-rate

injection tests run in the Subject Well on July 13, 2010 following installation of the final injection mechanical equipment.

22. The Wingate in the vicinity of the Subject Well is part of a structural anticline that plunges to the northwest creating northerly structural dips at the position of the Subject Well. Respondent Living Rivers expressed its concerns that the injected fluids will migrate upwards against the dip of the Wingate to the southeast to an outcrop of the Wingate located in the canyons carved by the Colorado River near Westwater Canyon, approximately 5.8 miles from the Subject Well. The surface exposures of the Wingate in the Westwater Canyon area are approximately 800 feet higher in elevation than the top of the Wingate in the Subject Well. Westwater's evidence demonstrated that it is unlikely that either the injected fluids or formation fluids will reach the exposures of the Wingate in the Westwater Canyon area because of the lateral and vertical separation between the Subject Well and the outcrops, as well as the details of the local and regional geologic setting and the nature of the injection operations.

23. Living Rivers also expressed its concerns that H<sub>2</sub>S gas could be generated within the Wingate injection intervals in connection with the injection operations, and that the H<sub>2</sub>S gas could migrate into and thereby adversely affect a deposit of helium located in the Entrada to the northwest or migrate to the southeast to the exposures of the Wingate in the Westwater Canyon area. Westwater's evidence demonstrated that its operations will remove organic matter from the produced water and treat the water with biocide and sequestering agents before it is injected into the Subject Well to prevent the formation of H<sub>2</sub>S gas in the Wingate reservoir, and that it will test the water in the Wingate to be certain that no H<sub>2</sub>S gas is being generated in the reservoir.

24. The bond posted with the Division by Westwater is adequate for the purposes of the Subject Well.

25. The Division expressed its support for Westwater's Request at the hearing.

26. The Subject Well is suitable for approval as a Class II injection well and the proposed injection operations are suitable for approval as produced water disposal operations. The Subject Well and proposed operations will confine the injection fluids to the injection intervals and will prevent pollution and damage to any USDW or other resources.

27. The Board voted unanimously to approve Westwater's Application and Request for Agency Action.

### **CONCLUSIONS OF LAW**

1. Due and regular notice of the time, place, and purposes of the Board's regularly scheduled December 8, 2010 hearing was given to all interested parties in the form and manner and within the time required by law and the rules and regulations of the Board. Due and regular notice of the filing of the Request was given to all interested parties in the form and manner required by law and the rules and regulations of the Board.

2. The Board has exclusive jurisdiction of the parties and subject matter of this Request for Agency Action, and has the power and authority to make and issue the order herein set forth pursuant to Section 40-6-5(5)(a) of the Utah Code Annotated and Rules R649-5-1 and R649-5-3(4), U.A.C.

3. Good cause appears to authorize underground water disposal operations for produced water utilizing the Subject Well as proposed.

4. Westwater's Application meets all applicable statutory and administrative requirements for the approval of the Subject Well as a Class II injection well.

5. Westwater has sustained its burden of proof, demonstrated good cause, and satisfied all legal requirements for granting Westwater's Request for Agency Action.

6. Approving the Subject Well as a Class II injection well, and approving the proposed injection operations, as introduced and adduced at the December 8, 2010 hearing in this Cause, is reasonable and in the public interest, and will prevent waste and will protect the correlative rights of all owners.

### **ORDER**

Based upon Westwater's Request for Agency Action, the testimony and evidence submitted and entered at the December 8, 2010 hearing, and the findings of fact and conclusions of law as stated above, it is therefore ordered that:

1. The Application of Westwater Farms, LLC for approval of the Harley Dome #1 Well as a Class II UIC injection well is approved and Westwater Farms, LLC's Request for Agency Action is granted.
2. The underground injection of produced water into the Wingate Sandstone Formation beneath the Subject Lands for produced water disposal purposes is hereby authorized.
3. The injection pressure in the Harley Dome #1 Well may reach, but not exceed, 360 pounds per square inch.
4. Living River's Second Motion to Continue is denied.
5. Pursuant to U.A.C. Rule R641 and Utah Code Ann. §§ 63G-4-204 to -208, the Board has considered and decided this matter as a formal adjudication.
5. This Findings of Fact, Conclusions of Law, and Order ("Order") is based exclusively on evidence of record in the adjudicative proceeding or on facts officially noted, and constitutes the signed written order stating the Board's decision and the reasons for the decision, all as required by the Utah Administrative Procedures Act, Utah Code Ann. § 63G-4-208 and U.A.C. Rule R641-109.

6. Notice re Right to Seek Judicial Review by the Utah Supreme Court or to

Request Board Reconsideration: The Board hereby notifies all parties in interest that they have the right to seek judicial review of this final Board Order in this formal adjudication by filing a timely appeal with the Utah Supreme Court within 30 days after the date that this Order is issued. Utah Code Ann. §§ 63G-4-401(3)(a) and -403. As an alternative to seeking immediate judicial review, and not as a prerequisite to seeking judicial review, the Board also hereby notifies parties that they may elect to request that the Board reconsider this Order, which constitutes a final agency action of the Board. Utah Code Ann. § 63G-4-302. The Utah Administrative Procedures Act provides:

(1)(a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63G-4-301 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.

(3)(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Id. The Board also hereby notifies the parties that Utah Administrative Code Rule R641-110-100, which is part of a group of Board rules entitled, "Rehearing and Modification of Existing Orders," states:

Any person affected by a final order or decision of the Board may file a petition for rehearing. Unless otherwise provided, a petition for rehearing must be filed no later than the 10<sup>th</sup>

day of the month following the date of signing of the final order or decision for which the rehearing is sought. A copy of such petition will be served on each other party to the proceeding no later than the 15<sup>th</sup> day of that month.

Id. See Utah Administrative Code R641-110-200 for the required contents of a petition for rehearing. If there is any conflict between the deadline in Utah Code Ann § 63G-4-302 and the deadline in Utah Administrative Code R641-110-100 for moving to rehear this matter, the Board hereby rules that the later of the two deadlines shall be available to any party moving to rehear this matter. If the Board later denies a timely petition for rehearing, the party may still seek judicial review of the Order by perfecting a timely appeal with the Utah Supreme Court within 30 days thereafter.

7. The Board retains continuing jurisdiction over all the parties and over the subject matter of this Cause, except to the extent said jurisdiction may be divested by the filing of a timely appeal to seek judicial review of this Order by the Utah Supreme Court.

8. For all purposes, the Chairman's signature on a faxed copy of this Order shall be deemed the equivalent of a signed original.

DATED this 13 day of January, 2011.

STATE OF UTAH  
BOARD OF OIL, GAS AND MINING



By \_\_\_\_\_  
Douglas E. Johnson, Chairman

## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER for Docket No. 2010-029, Cause No. UIC-358.1 to be mailed with postage prepaid, this 18th day of January, 2011, to the following:

Thomas W. Clawson  
Van Cott, Bagley, Cornwall & McCarthy  
36 South State Street, Suite 1900  
Salt Lake City, UT 84111

Westwater Farms, LLC  
% Tom Warnes  
PO Box 23358  
Silverthorne, CO 80498

Michael S. Johnson  
Assistant Attorneys General  
Utah Board of Oil, Gas & Mining  
1594 West North Temple, Suite 300  
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[Via Email]

Steven F. Alder  
Fred Donaldson  
Assistant Attorneys General  
Utah Division of Oil, Gas & Mining  
1594 West North Temple, Suite 300  
Salt Lake City, UT 84116  
[Via Email]

Grand County  
Road Department  
125 East Center  
Moab, UT 84532

United States Bureau of Land Management  
Moab Field Office  
82 East Dogwood  
Moab, UT 84532

Federal Highway Administration  
2520 West 4700 South, Suite 9-A  
Salt Lake City, UT 84118-1847

Mid-America Pipeline Company  
PO Box 4324  
Houston, TX 77210

Utah School and Institutional Trust Lands  
Administration  
675 East 500 South, Suite 500  
Salt Lake City, UT 84102-2818

Petro Resrc Corp.  
777 Post Oak Blvd, Suite 910  
Houston, TX 77056

RMOC Holdings, LLC  
921 East Bellevue Avenue  
Littleton, CO 80121  
[Undeliverable]

Shiprock Helium, LLC  
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Amarillo, TX 79159

Retamco Operating, Inc.  
Attn: Joe Glennon  
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Red Lodge, MT 59068-0790

Living Rivers  
John Weisheit  
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Moab, UT 84532

Bill Love  
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Moab, UT 84532



United States Fish and Wildlife Service  
Attn: Larry Crist  
Utah Field Office  
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West Valley City, UT 84119

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*Julie Ann Carter*

Addendum 2: Utah Code Ann. §40-6-5

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Title 40 Mines and Mining

Chapter  
6 Board and Division of Oil, Gas, and Mining

Section  
5 Jurisdiction of board -- Rules.

**40-6-5. Jurisdiction of board -- Rules.**

(1) The board has jurisdiction over all persons and property necessary to enforce this chapter. The board shall enact rules in accordance with the Utah Administrative Rulemaking Act.

(2) The board shall adopt rules and make orders as necessary to administer the following provisions:

(a) Ownership of all facilities for the production, storage, treatment, transportation, refining, or processing of oil and gas shall be identified.

(b) Well logs, directional surveys, and reports on well location, drilling, and production shall be made and filed with the division. Logs of wells marked "confidential" shall be kept confidential for one year after the date on which the log is required to be filed, unless the operator gives written permission to release the log at an earlier date. Production reports shall be:

(i) filed monthly;

(ii) accurate; and

(iii) in a form that reasonably serves the needs of state agencies and private fee owners.

(c) Monthly reports from gas processing plants shall be filed with the division.

(d) Wells shall be drilled, cased, operated, and plugged in such manner as to prevent:

(i) the escape of oil, gas, or water out of the reservoir in which they are found into another formation;

(ii) the detrimental intrusion of water into an oil or gas reservoir;

(iii) the pollution of fresh water supplies by oil, gas, or salt water;

(iv) blowouts;

(v) cavings;

(vi) seepages; and

(vii) fires.

(e) The drilling of wells shall not commence without an adequate and approved supply of water as required by Title 73, Chapter 3. This provision is not intended to impose any additional legal requirements, but to assure that existing legal requirements concerning the use of water have been met prior to the commencement of drilling.

(f) The operator shall furnish a reasonable performance bond or other good and sufficient surety, conditioned for the performance of the duty to:

(i) plug each dry or abandoned well;

(ii) repair each well causing waste or pollution; and

(iii) maintain and restore the well site.

(g) Production from wells shall be separated into oil and gas and measured by means and upon standards that will be prescribed by the board and will reflect current industry standards.

(h) Crude oil obtained from any reserve pit, disposal pond or pit, or similar facility, and any accumulation of nonmerchantable waste crude oil shall be treated and processed, as prescribed

by the board.

(i) Any person who produces, sells, purchases, acquires, stores, transports, refines, or processes oil or gas or injects fluids for cycling, pressure maintenance, secondary or enhanced recovery, or salt water disposal in this state shall maintain complete and accurate records of the quantities produced, sold, purchased, acquired, stored, transported, refined, processed, or injected for a period of at least six years. The records shall be available for examination by the board or its agents at any reasonable time. Rules enacted to administer this subsection shall be consistent with applicable federal requirements.

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(j) Any person with an interest in a lease shall be notified when all or part of that interest in the lease is sold or transferred.

(3) The board has the authority to regulate:

(a) all operations for and related to the production of oil or gas including:

(i) drilling, testing, equipping, completing, operating, producing, and plugging of wells; and  
(ii) reclamation of sites;

(b) the spacing and location of wells;

(c) operations to increase ultimate recovery, such as:

(i) cycling of gas;

(ii) the maintenance of pressure; and

(iii) the introduction of gas, water, or other substances into a reservoir;

(d) the disposal of salt water and oil-field wastes;

(e) the underground and surface storage of oil, gas, or products; and

(f) the flaring of gas from an oil well.

(4) For the purposes of administering this chapter, the board may designate:

(a) wells as:

(i) oil wells; or

(ii) gas wells; and

(b) pools as:

(i) oil pools; or

(ii) gas pools.

(5) The board has exclusive jurisdiction over:

(a) class II injection wells, as defined by the federal Environmental Protection Agency or any successor agency; and

(b) pits and ponds in relation to these injection wells.

(6) The board has jurisdiction:

(a) to hear any questions regarding multiple mineral development conflicts with oil and gas operations if there:

(i) is potential injury to other mineral deposits on the same lands; or

(ii) are simultaneous or concurrent operations conducted by other mineral owners or lessees affecting the same lands; and

(b) to enter its order or rule with respect to those questions.

(7) The board has enforcement powers with respect to operators of minerals other than oil and gas as are set forth in Section **40-6-11**, for the sole purpose of enforcing multiple mineral development issues.

Amended by Chapter 62, 1988 General Session

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<< Previous Section (40-6-4)

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**Addendum 3:        Utah Admin. Code R649-5-1 and R649-5-2**

### **R649-5-1. Requirements for Injection of Fluids Into Reservoirs.**

1. Operations to increase ultimate recovery, such as cycling of gas, the maintenance of pressure, the introduction of gas, water or other substances into a reservoir for the purpose of secondary or other enhanced recovery or for storage and the injection of water into any formation for the purpose of water disposal shall be permitted only by order of the board after notice and hearing.

2. A petition for authority for the injection of gas, liquefied petroleum gas, air, water, or any other medium into any formation for any reason, including but not necessarily limited to the establishment of or the expansion of waterflood projects, enhanced recovery projects, and pressure maintenance projects shall contain:

2.1. The name and address of the operator of the project.

2.2. A plat showing the area involved and identifying all wells, including all proposed injection wells, in the project area and within one-half mile radius of the project area.

2.3. A full description of the particular operation for which approval is requested.

2.4. A description of the pools from which the identified wells are producing or have produced.

2.5. The names, description and depth of the pool or pools to be affected.

2.6. A copy of a log of a representative well completed in the pool.

2.7. A statement as to the type of fluid to be used for injection, its source and the estimated amounts to be injected daily.

2.8. A list of all operators or owners and surface owners within a one-half mile radius of the proposed project.

2.9. An affidavit certifying that said operators or owners and surface owners within a one-half mile radius have been provided a copy of the petition for injection.

2.10. Any additional information the board may determine is necessary to adequately review the petition.

3. Applications as required by R649-5-2 for injection wells that are located within the project area, may be submitted for board consideration and approval with the request for authorization of the recovery project.

4. Established recovery projects may be expanded and additional wells placed on injection only upon authority from the board after notice and hearing or by administrative approval.

5. If the proposed injection interval can be classified as an USDW, approval of the project is subject to the requirements of R649-5-4.

### **R649-5-2. Requirements for Class II Injection Wells Including Water Disposal, Storage and Enhanced Recovery Wells.**

1. Injection wells shall be completed, equipped, operated, and maintained in a manner that will prevent pollution and damage to any USDW, or other resources and will confine injected fluids to the interval approved.

2. The application for an injection well shall include a properly completed UIC Form 1 and the following:

2.1. A plat showing the location of the injection well, all abandoned or active wells within a one-half mile radius of the proposed well, and the surface owner and the

operator of any lands or producing leases, respectively, within a one-half mile radius of the proposed injection well.

2.2. Copies of electrical or radioactive logs, including gamma ray logs, for the proposed well run prior to the installation of casing and indicating resistivity, spontaneous potential, caliper, and porosity.

2.3. A copy of a cement bond or comparable log run for the proposed injection well after casing was set and cemented.

2.4. Copies of logs already on file with the division should be referenced, but need not be refiled.

2.5. A description of the casing or proposed casing program of the injection well and of the proposed method for testing the casing before use of the well.

2.6. A statement as to the type of fluid to be used for injection, its source and estimated amounts to be injected daily.

2.7. Standard laboratory analyses of:

2.7.1. The fluid to be injected,

2.7.2. The fluid in the formation into which the fluid is being injected, and

2.7.3. The compatibility of the fluids.

2.8. The proposed average and maximum injection pressures.

2.9. Evidence and data to support a finding that the proposed injection well will not initiate fractures through the overlying strata or a confining interval that could enable the injected fluid or formation fluid to enter any fresh water strata.

2.10. Appropriate geological data on the injection interval with confining beds clearly labeled,

2.10.1. Nearby Underground Sources of Drinking Water, including the geologic formation name,

2.10.2. Lithologic descriptions, thicknesses, depths, water quality, and lateral extent;

2.10.3. Information relative to geologic structure near the proposed well that may effect the conveyance and/or storage of the injected fluids.

2.11. A review of the mechanical condition of each well within a one-half mile radius of the proposed injection well to assure that no conduit exists that could enable fluids to migrate up or down the wellbore and enter improper intervals.

2.12. An affidavit certifying that a copy of the application has been provided to all operators, owners, and surface owners within a one-half mile radius of the proposed injection well.

2.13. Any other additional information that the board or division may determine is necessary to adequately review the application.

3. Applications for injection wells that are within a recovery project area will be considered for approval:

3.1. Pursuant to R649-5-1-3.

3.2. Subsequent to board approval of a recovery project pursuant to R649-5-1-1.

4. Approval of an injection well is subject to the requirements of R649-5-4, if the proposed injection interval can be classified as an USDW.

5. In addition to the requirements of this section, the provisions of R649-3-1, R649-3-4, R649-3-24, R649-3-32, and R649-8-1 and R649-10 shall apply to all Class II injection wells.

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Addendum 4: Utah Code Ann. §63G-4-302(1)(a)

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4

Administrative Procedures Act

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302

Agency review -- Reconsideration.

**63G-4-302. Agency review -- Reconsideration.**

(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section **63G-4-301** is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be mailed to each party by the person making the request.

(3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Renumbered and Amended by Chapter 382, 2008 General Session

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**Addendum 5:      Utah Admin. Code R641-110-200**

**R641-110-200. Contents of Petition.**

A petition for rehearing will set forth specifically the particulars in which it is claimed the Board's order or decision is unlawful, unreasonable, or unfair. If the petition is based upon a claim that the Board failed to consider certain evidence, it will include an abstract of that evidence. If the petition is based upon newly discovered evidence, then the petition will be accompanied by an affidavit setting forth the nature and extent of such evidence, its relevancy to the issues involved, and a statement that the party could not, with reasonable diligence, have discovered the evidence prior to the hearing.

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Addendum 6:      Utah Code Ann. §63G-4-403

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Administrative Procedures Act

Section

403

Judicial review -- Formal adjudicative proceedings.

**63G-4-403. Judicial review -- Formal adjudicative proceedings.**

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.